



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

This ruling has been modified by court action  
The ruling and judgment can be viewed in PDF  
format below.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 20, 2008

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

Mr. Dan J. Junell  
Assistant General Counsel  
Teacher Retirement System of Texas  
1000 Red River Street  
Austin, Texas 78701-2698

OR2008-15991

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 328439.

The Teacher Retirement System ("TRS") received three requests for information pertaining to RFP 323-PBM-07M (Proposal to Provide Pharmacy Benefit Manager Services for TRS-ActiveCare), including the awarded contract, from Catalyst Rx ("Catalyst"), CVS Caremark ("Caremark"), and Prime Therapeutics LLC ("Prime").<sup>1</sup> You state that TRS does not have some of the requested information.<sup>2</sup> You also state that some of the requested information will be released, but assert that some of the submitted information is excepted under sections 552.104, 552.110, 552.111, and 552.136 of the Government Code. You also state, and provide documentation showing, that you notified the following companies of TRS's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released: Caremark; Catalyst; Express Scripts, Inc. ("Express"); HealthTrans; Innoviant; Medco Health Solutions, Inc. ("Medco"); Prime; SXC Health Solutions, Inc. (SXC); and Walgreens Health Initiatives ("Walgreens"). *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). Caremark, Catalyst, Express, HealthTrans, Medco, Prime, and Walgreens assert that some of their information is excepted under sections 552.101, 552.104, or 552.110 of the Government Code. We have reviewed the submitted arguments and information.

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<sup>1</sup>You inform us that the requestors do not seek their own proposal information.

<sup>2</sup>The Act does not require a governmental body to disclose information that did not exist when the request for information was received.

You have marked information to be withheld under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder."<sup>3</sup> However, you did not provide any explanation of the applicability of this section to the information at issue. See Gov't Code § 552.301(e). Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. See Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). In addition, the submitted information pertains to a contract that has been awarded. See Open Records Decision Nos. 306 (1982), 184 (1978). Therefore, none of the submitted information is excepted under section 552.104.

You assert that Exhibit 2 and the yellow-highlighted information in Exhibit 3 are excepted under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual

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<sup>3</sup>Catalyst and Walgreens also assert 552.104 for this information.

information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You assert that Exhibit 2 relates to the evaluation of the proposals and that it was "created by the personnel and agents of the system as trustee for TRS-ActiveCare in a deliberative process aimed at providing advice, opinion and recommendations." You also assert that the yellow-highlighted information in Exhibit 3 "should be withheld as constituting inextricably intertwined factual information relating to the evaluation materials in TRS brief Exhibit 2." After review of your arguments and the documents at issue, we agree that TRS may withhold the information we have marked in Exhibit 2 under section 552.111 of the Government Code. However, we find you have not established that the remaining information at issue, including letters from TRS to third parties and summaries of the proposals, consists of advice, opinions, and recommendations of TRS; therefore, TRS may not withhold the remaining information under section 552.111.

You assert that the submitted information may contain insurance policy numbers that are excepted under section 552.136 of the Government Code. Section 552.136(b) of the Government Code provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." The submitted information does not contain insurance policy numbers; therefore, TRS has not established that any of the submitted information is excepted under section 552.136.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Innoviant and SXC have not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of these companies, and TRS may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

Catalyst asserts that its information is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." However, Catalyst does not cite to any specific law, and we are not aware of any, that makes any portion of the submitted information confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Therefore, TRS may not withhold any portion of the submitted information under section 552.101 of the Government Code.

Caremark, Catalyst, Express, HealthTrans, Medco, Prime, and Walgreens assert that some of their information is excepted under section 552.110 of the Government Code.<sup>4</sup> Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>5</sup> Restatement of Torts § 757 cmt. b. This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors

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<sup>4</sup>Express submitted documents in which it redacted the information that it seeks to withhold under section 552.110.

<sup>5</sup>The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret: (1) the extent to which the information is known outside of the company; (2) the extent to which it is known by employees and others involved in the company's business; (3) the extent of measures taken by the company to guard the secrecy of the information; (4) the value of the information to [the company and its competitors]; (5) the amount of effort or money expended by the company in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Restatement of Torts § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983). We also note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." Restatement of Torts § 757 cmt. b; see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); ORD 319 at 3, 306 at 3.

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. See ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). However, the pricing information of a winning bidder is generally not excepted under section 552.110(b). See Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). See generally Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. See ORD 514.

Caremark, Catalyst, Express, HealthTrans, Medco, Prime, and Walgreens have established that the release of some of the information at issue would cause substantial competitive injury; therefore, TRS must withhold this information, which we have marked, under section 552.110(b). However, some of the interested third parties have made some of the information in their proposals publicly available on their websites. Because these companies themselves published this information, we are unable to conclude that such information is proprietary. Caremark, Catalyst, Express, HealthTrans, Medco, Prime, and Walgreens have failed to establish a *prima facie* case that any of the remaining information is a trade secret. See ORD 402. These companies have also made only conclusory allegations that release of the remaining information at issue would cause substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. Thus, TRS may not withhold any of the remaining information under section 552.110.

Finally, we note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the

copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

To conclude, TRS must withhold the information we have marked under section 552.110 of the Government Code. TRS may withhold the information we have marked under section 552.111 of the Government Code. TRS must release the remaining information, but any copyrighted information may only be released in accordance with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

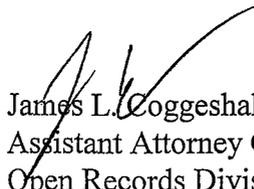
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/ma

Ref: ID# 328439

Enc. Submitted documents

c: Ms. Jennifer D. Molinar  
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Filed in The District Court  
of Travis County, Texas

LM SEP 04 2013

At 2:13 M.  
Amalia Rodriguez-Meridoza, Clerk

CAUSE NO. D-1-GN-08-004330

CAREMARK, L.L.C.  
*Plaintiff,*

v.

GREG ABBOTT, ATTORNEY GENERAL  
OF TEXAS,  
*Defendant.*

§ IN THE DISTRICT COURT  
§  
§  
§ 353d JUDICIAL DISTRICT  
§  
§  
§ TRAVIS COUNTY, TEXAS

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Caremark, L.L.C., ("Caremark") and Defendant Greg Abbott, Attorney General of Texas, appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally resolved.

This is an action brought by Plaintiff Caremark to challenge Letter Ruling OR2008-15991 (the "Ruling"). The Teacher Retirement System of Texas ("TRS") received requests from Catalyst Rx and Prime Therapeutics LLC (the "Requestors") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for, among other things, certain documents submitted to TRS by Caremark and created by TRS in response to bids received from Caremark. These documents contain information designated by Caremark as confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA ("Caremark Information"). TRS requested a ruling from the Open Records Division of the Office of the Attorney General ("ORD"). ORD subsequently issued the Ruling, ordering the release of the Caremark Information. TRS holds the information that has been ordered to be disclosed.

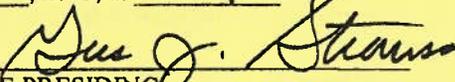
The parties represented to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the Requestors have

in writing voluntarily withdrawn their requests for information, (2) in light of these withdrawals the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

**IT IS THEREFORE ORDERED** that:

1. Because the requests have been withdrawn, no Caremark Information should be released in reliance on Letter Ruling OR2008-15991. Letter Ruling OR2008-15991 should not be cited for any purpose as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. Within 30 days of the Court signing this Final Judgment, the Office of the Attorney General shall notify TRS in writing of this Final Judgment and shall attach a copy of this Final Judgment to the written notice. In the notice, the Office of the Attorney General shall expressly instruct TRS that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2008-15991 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any Caremark Information in reliance on said Ruling, and if TRS receives any future requests for the same or similar Caremark Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2008-15991.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on Sept. 4, 2013, at 2 p. m.

  
JUDGE PRESIDING

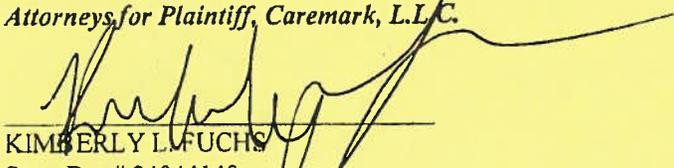
AGREED:



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*Attorneys for Plaintiff, Caremark, L.L.C.*



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